TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

II. STATUTES

No. 93-141

In the

Supreme Court of the United States

October Term, 1993

WEST LYNN CREAMERY, INC. and
LECOMTE DAIRY, INC.,
Petitioner,

v.

JONATHAN HEALY, Commissioner of
Massachusetts Department of Food and Agriculture,
Respondent.

On Writ of Certiorari to the Massachusetts Supreme Judicial Court

Brief of the State of New Jersey As Amicus Curiae in Support of the Respondent

INTEREST OF AMICUS CURIAE

This case involves the ability of State governments to regulate all aspects of the dairy industry in order to ensure the maintenance of a fresh, wholesome supply of sanitary milk for the consumers of their respective States. The State of New Jersey has long maintained an aggressive milk control program for the benefit of producers, the State's consumers and dealers.

In addition, New Jersey has experienced a similar crisis regarding the failure of the Federal Milk Marketing Orders to provide a reasonable return to its dairy farmers. As a

result the number of New Jersey dairy farms have been significantly reduced.

New Jersey believes that support systems for dairy farmers, such as the one Massachusetts has enacted, are vital options to maintaining a healthy dairy industry. This is necessary to assure not only an adequate supply of milk to New Jersey consumers, but to provide many attendant benefits such as the maintenance of the agricultural services industry and taxpaying open space. Such goals are especially important in New Jersey the country's most densely populated state. Through its experience in milk regulation, New Jersey is uniquely qualified to discuss the importance of maintaining dairy producers to the health of the State's overall dairy industry.

In a broader context, New Jersey supports the ability of states to utilize two important tools for governing -- (1) the payment of subsidies to domestic industries and (2) the even-handed collection of fees for events occurring within its borders. The provision of subsidies funded through special purpose fees and taxes should be an option available to state governments to carry out their legitimate functions.

STATEMENT OF THE CASE

The Commissioner of the Massachusetts Department of Food and Agriculture issued a "Pricing Order" (J.A. 32-43[1]) upon finding that the State's milk production industry was in a state of emergency and was predicted, in the absence of immediate price stabilization, to lose, "over one-third of its remaining dairy farms over the next year," (J.A. 28). The Governor's Special Commission found that this crisis would threaten both the supply of fresh milk to Massachusetts consumers as well as the open farm lands

[1] The term "J.A." refers to Joint Appendix.

currently "used as wildlife refuges, for recreation, hunting, fishing, tourism, and education". (J.A. 13).

This "Pricing Order" did not actually set milk prices in Massachusetts or elsewhere, but instead established a subsidy system to increase the amount of income that Massachusetts milk producers would receive for their milk. The Order set a "target price" to be used in determining the amount of the subsidy that Massachusetts milk producers were to receive. The "target price" represented the amount that efficient dairy farmers in Massachusetts would require per hundred pounds of milk (hundredweight) in order to remain viable. (J.A. 32.) Therefore, it provided a benchmark for use in apportioning subsidy money to them. To receive the equivalent of the "target price" for each hundredweight of milk produced, milk producers would have to receive subsidy premiums equal to the difference between that "target price" and the federally mandated "blend price" for the area.[2]

The subsidies are paid to Massachusetts dairy farmers from a special purpose fund, the Dairy Equalization Fund. Each month, each Massachusetts milk producer receives a pro rata share of the money in the Equalization Fund based on the amount of milk produced (up to a maximum of two hundred thousand pounds). If there is not enough money in the Dairy Equalization Fund in a given month to give each Massachusetts dairy farmer this maximum amount, then the dairy farmer only receives its pro rata share of the money in the fund. If there is money left in the fund after all Massachusetts dairy farmers receive the full distribution for the milk they produce, it is divided among all milk dealers in proportion to their Fund contributions. (J.A. 36-38).

[2] For convenience, amicus refer to that difference as the "target premium."

Massachusetts funds its Dairy Equalization Fund through fees imposed on all Massachusetts milk dealers selling milk for consumption in Massachusetts. The amount of the fee is equal to one-third of the "target premium" per hundredweight; the same fee is paid by all such dealers, regardless of the origin of their milk or the price that they paid for it. No fees are collected from out-of-state milk producers.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners' arguments turn on their characterization of the Massachusetts Order as one involving the extraterritorial setting of milk prices, (See, e.g., Pet. Br. 12, 16, 26) or the impermissible appropriation of out-of-state money for the benefit of in-state dairy farmers. (See Pet. Br. 11, 12, 16, 30-31). However, a fair reading of the Massachusetts Pricing Order demonstrates that it does not set milk prices either inside or outside Massachusetts, nor does it funnel out-of-state money to in-state dairy farmers.

Instead, the Order achieves the entirely permissible goal of preserving a valued local industry through the use of two time-honored mainstays of state governance -- (1) the payment of subsidies to those within the State who are engaged in a particular industry; and (2) the evenhanded collection of fees for events occurring within its borders. These two legitimate, longstanding state powers are not rendered unconstitutional when used in concert to achieve a permissible purpose simply because that same purpose could also have been pursued through constitutionally impermissible means (such as extraterritorial price-fixing or the erection of trade barriers).

It is well established that States may, consistent with the Commerce Clause, subsidize their own domestic industries. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]

prohibition[.]" New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988). In addition, the evenhanded collection of fees for events occurring within State borders does not violate the Commerce Clause. Therefore these two permissible governmental functions are not rendered impermissible when they are used in concert to achieve a legitimate state purpose.

The Order's subsidy program represents a permissible means for Massachusetts to "encourag[e] domestic industry," Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984), because the Order does not seek to "build up [Massachusetts'] domestic commerce by means of unequal and oppressive burdens on the industry and business of other states." Id. at 272 (quoting Guy v. Baltimore, 100 U.S. 434, 443 (1980)). See Opinion of the Justices, 601 A.2d 610, 617-19 (Me. 1991) (upholding constitutionality of similar subsidy program for Maine dairy farmers); Cumberland Farms, Inc. v. LaFaver, ___ F. Supp. ___ (D. Me. Aug. 3, 1993) (No. 93-2066).

Since the Massachusetts Order involves subsidies, no Commerce Clause analysis is required. However, if the Court determines that the Massachusetts milk pricing subsidy is subject to Commerce Clause analysis, the appropriate standard by which to evaluate the validity of the Massachusetts law is that set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Under this standard, where a local enactment operates evenhandledly to effectuate a valid local public interest and its effects upon interstate commerce are merely incidental, the local enactment will be upheld unless the burden imposed upon interstate commerce is found clearly excessive in relation to the local interest advanced. Id. at 142.

Any burden on interstate commerce is indirect. The Massachusetts law is applied evenhandedly to in-state and out-of-state milk dealers.

The local benefits furthered by such laws far outweigh any indirect burden on interstate commerce. The maintenance of local farmers is essential to ensuring an adequate supply of milk to consumers. Milk is a unique, highly perishable commodity whose supply levels fluctuate. It is important to maintain a stable local milk supply in periods of excess milk supply in order to ensure adequate supplies during periods of shortages.

ARGUMENT

I. The Massachusetts Statute, Which Combines the Valid Subsidization of In-State Industry With the Evenhanded Collection of Dealer Fees From Dealers Selling Milk Within the State, Is Completely Consistent With the Commerce Clause.

A. A State's Subsidization of an In-State Industry Does Not Violate the Commerce Clause.

As this Court observed in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 271 (1984), "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging local industry." Moreover, a State may, consistent with the Commerce Clause, provide that encouragement to local industry in the form of a direct subsidy. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition[.]" New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988). State subsidies for local industries are generally lawful because "[t]he Commerce Clause does not prohibit all state action designed to give its residents an

advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce. Id. (emphasis in original). Thus, the Commerce Clause does not prohibit a state from providing direct support for its local industry as long as that support is not accompanied by regulatory measures which burden or restrict the flow of interstate commerce.

Indeed, petitioners apparently concede that a direct subsidy from general revenues to Massachusetts dairy farmers would pass constitutional muster. (See Pet. Br. 32 & n.27 (suggesting that "the state could provide dairy farmers with tax subsidies from the Commonwealth's general tax fund," and that "such subsidy programs are presumed to be valid."); (Id. at 29).

Petitioners strenuously argue, however, that the Massachusetts pricing order is not a subsidy, (See Pet. Br. at 13, 28-31), placing great weight on the fact that the word "subsidy" does not appear in the Commissioner's Order. (Id. at 13, 30). But a measure's validity cannot be determined by semantics; it is the substance of the measure that must be scrutinized under the Commerce Clause. When that exercise is undertaken, it becomes quite obvious that the Massachusetts Order is a subsidy. State funds are channeled to those Massachusetts farmers engaged the milk production. In a manner analogous to the State's action in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), Massachusetts is spending its own, legitimately obtained money to "purchase" something it values: the viability of its farmers and the State's entire dairy industry and the resulting aesthetic and community benefits. See Hughes v. Alexandria Scrap, 426 U.S. at 809, 810.

The repeated efforts of petitioners to characterize the Order, not as a subsidy, but as "price-fixing," are unpersuasive when the actual manner in which the Order operates is examined. As this Court has admonished, such

"catch words and labels . . . are subject to the dangers that lurk in metaphors and symbols." Henneford v. Silas Mason Co., 300 U.S. 577, 586 (1937). It is inaccurate to characterize the Order as price-fixing, when milk prices are not set, either in Massachusetts or outside the State. The Order does not impose changes of any kind on the milk prices that are paid by dealers to producers. Dealers have every incentive to buy milk as cheaply as possible, from whatever source. The fact that price-setting could have been used to achieve the same effect of fostering a domestic industry does not mean that Massachusetts Order is a form of price-setting. (See Part C., below).

Indeed, the premise for petitioners' price-setting analogies -- that Massachusetts, having set prices for its own milk, has extended those same prices extraterritorially in order to avoid competitive undercutting -- collapses upon closer scrutiny. The "target price" which Massachusetts dairy farmers receive for their milk has clearly not, even under petitioners' erroneous assumptions, been imposed upon dealers, since the dealer's fee would only be enough to cover one-third of the distance between the federal minimum and the "target price." The "target price" serves not as the foundation of an extraterritorial price-setting scheme, but only as a benchmark for distributing domestic subsidies. The dealer fees are fully legitimate fees which the government is entitled to collect and use as a funding source. (See Part B, below).

Petitioners also argue that the fact that the money flows from a special purpose fund, rather than from general revenues, keeps it from being a permissible subsidy. (Pet. BR. 28). But where, as here, the collection of money into the special purpose fee is a valid exercise of state authority over transactions taking place within its boundaries (See Part B, below), there is no constitutionally cognizable basis for drawing a distinction based on revenue source.

The distinction which petitioners attempt to draw between the revenue sources is based on the erroneous factual premise that the Dairy Equalization Fund is primarily financed by out-of-state producers. (See. Pet. Br. 32 n. 27) (distinguishing subsidy programs drawn from general revenues from the pricing order at issue here on the grounds that the former "would be using Massachusetts funds derived from Massachusetts residents" and "would afford Massachusetts legislators and voters a direct say in whether to support a particular state industry with state tax dollars"). But the dealer fees are not drawn from nonresident producers, as petitioners imply; instead, they are paid by Massachusetts milk dealers who either absorb the loss themselves or pass it on to Massachusetts consumers. (J.A. 58-59). The record in this case clearly indicates that the two parties upon which the incidence of the fee falls -- Massachusetts dealers and Massachusetts consumers -- were quite involved in the process of developing the Order. (J.A. 26-27).

Reduced to its essence, the argument of petitioners concerning the effects of the Pricing Order on interstate commerce amounts to an assertion that the Order must be invalidated as discriminatory because it does not provide equivalent subsidies to all out-of-state dairy farmers who compete with the recipients of the subsidy in Massachusetts. See e.g., J.A. 59 (Comments of Mr. Altman from Record of Proceedings Before the Commissioner) ("Massachusetts farmers are getting $15 [per hundredweight whereas New York and Vermont farmers are not[.]").

But the Commerce Clause is not violated simply because the State does not extend a subsidy to all those outside of the State who compete in the same industry. On the contrary, the Court has indicated that such "rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural

improvement and business development programs . . . . reflect the essential and patently unobjectionable purpose of state government -- to serve the citizens of the State." Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

The negative economic effects of which petitioners complain are not unique to subsidies drawn from special purpose funds; they are the inevitable result of any subsidy program which succeeds in improving the competitive position of domestic industry vis-a-vis its out-of-state competitors. As a consequence, under petitioners' analysis no state subsidy program could survive unless it were made available to all potential out-of-state competitors of in-state recipients. Such a radical infringement of state authority finds no support in the dormant Commerce Clause. Since the beginning of our nation, the States have "experiment[ed] with different methods of encouraging local industry," and the Court has never construed the Commerce Clause as requiring a state to "subsidize out-of-state business." Alexandria Scrap, 426 U.S. at 816 (Stevens, J., concurring).[3] On the contrary, the Court recently reaffirmed in Limbach that "[d]irect subsidization of domestic industry does not ordinarily run afoul of" the Commerce Clause. Limbach, 486 U.S. at 278.

B. The Collection of a Fee for All Milk Handled For Sale Within the State Is a Valid Exercise of State Governance Which Does Not Interfere With or Discriminate Against Interstate Commerce.

Petitioners' argument is premised on the assertion that the dealer fees assessed on all milk dealers selling milk for

[3] See Id. at 816-17 (noting the absence of any Commerce Clause challenge to a state subsidy program prior to Alexandria Scrap); Id. at 805, 807 (majority opinion) (same).

consumption in Massachusetts are a thinly veiled vehicle for drawing money away from out-of-state milk producers and passing it onto in-state milk producers. (Pet. B. p.24). This premise is supported neither by the facts nor by economics. The assessment placed on dealers within the State instead serves primarily to burden some state residents (milk dealers and milk consumers) for the benefit of other state residents (dairy farmers). This has been the intent of the law from the outset. (J.A. 17-18, 22-23).

The factual findings below indicate that this intention has been realized. That dealer fees are a recognized way of reassigning in-state benefits and burdens is demonstrated by the fact that both of the New England "export states" identified by petitioner (Maine and Vermont) (J.A. 16-17), have adopted legislation similar to Massachusetts' which provides for the distribution to in-state milk producers of fees assessed on all milk dealers selling within the State. See Vt. Stat. Ann.Tit. 6 §2924 (West Supp. 1993), Me. Rev. Stat. Ann. Tit. 36 §4541 (West 1992).

Hence, contrary to petitioners' assertions, the Order is not a conduit channeling out-of-state money into the pockets of in-state dairy farmers; instead, it is a nondiscriminatory measure designed to reallocate State resources. The Order treats all in-state and out-of-state dealers alike: all of them must pay premiums based on their sales of milk to in-state customers, and none of them are required to pay premiums on their sales of milk to out-of-state customers. No provision of the Order discriminates against out-of-state dealers or interferes with the interstate transportation of milk. The Order does not restrict the flow of milk into or out of Massachusetts, nor does it tax the interstate shipment of milk or any out-of-state purchases or sales of milk. The Order also does not restrict the ability of in-state or out-of-state dealers to buy milk from out-of-state producers at whatever price such producers may charge.

Under the Order, all in-state and out-of-state dealers selling milk in Massachusetts must pay the same premium on local sales of milk, resulting in "equal treatment for in-state and out-of-state [dealers] similarly situated..." Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 70 (1963). "The stranger from afar is subject to no greater burdens . . . than the dweller within the gates." Heeneford, 300 U.S. at 584.

The Order's requirement of monthly premium payments by all milk dealers on their in-state sales is precisely the kind of evenhanded regulation of local transactions in milk that this Court has previously upheld. In Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939), for example, the Court upheld minimum milk prices imposed upon all milk dealers buying milk within the state of Pennsylvania, even though the ultimate destination of some of the milk was out of state. In that case, the Court reasoned that "the uniform operation of the statute locally would be crippled and might be impracticable" if milk dealers could "ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state." Id. at 353. Likewise, in this case, Massachusetts is imposing a fee on all dealers who seek to sell their milk in Massachusetts. Such a scheme could not operate in a uniform and workable manner if dealers could ignore the fee to the extent that some portion of their milk hailed from out of state. See also Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 378, 381-82 (1964) (upholding "that provision in the Florida Milk Control Act which imposes a tax in the amount of 15/100 of 1 cent upon each gallon of milk distributed by a Florida distributor.")

While it may be the case that the payment of dealer fees, coupled with the improved competitive position of Massachusetts dairy farmers, has some impact on milk producers in other states, that effect is only an incidental

one. The fact that some incidental burden results from a State's valid regulatory action is not fatal under the Commerce Clause; indeed, any regulatory action will have some such impact. As the analysis in Part C demonstrates, however, any such incidental impact is not of constitutional stature. "Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly burdens interstate commerce." Eisenberg, 306 U.S. at 351.

C. The Price Order Is Not Rendered Unconstitutional By Virtue of the Fact That Its Two Components, Each of Which Is Valid Under the Commerce Clause, Work Together To Achieve the Legitimate State Purpose of Assisting the State's Dairy Industry.

1. Massachusetts' Order Was Adopted in Furtherance of a Substantial, Legitimate State Interest and Provides Significant Local Benefits.

Ever since Nebbia v. New York, 291 U.S. 502 (1934), this Court has recognized that states have a legitimate interest in regulating the milk industry to prevent conditions that would "cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself." Id. at 538. In H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 529 (1949), the Court pronounced:

> Production and distribution of milk are so intimately related to public health and welfare that the need for regulation to protect those interests

> has long been recognized and is, from a constitutional standpoint, hardly controversial. Also, the economy of the industry is so eccentric that economic controls have been found at once necessary and difficult. These have evolved detailed, intricate and comprehensive regulations, including price-fixing. They have been much litigated but were generally sustained by this Court as within the powers of the State over its internal commerce as against the claim that they violated the Fourteenth Amendment [Footnote and citation omitted.]

In this case, the Massachusetts Commissioner concluded, after extensive public hearings, that "an emergency of unprecedented proportions" existed within the Massachusetts dairy industry and could be remedied only by adopting the subsidy program contained in the Order. (J.A. 30-31) The Commissioner determined that, unless Massachusetts dairy farmers received a larger payment for their milk than the minimum price provided by federal regulations, many local farmers would fail and an industry critical to the state's economy would face economic ruin. The Commissioner also found that, by supporting local dairy farmers, the Order would result in assuring "a local supply of fresh milk for consumers". (J.A. 32).

Thus, the purpose of the Order, which is designed to provide important local benefits, is legitimate. The subsidy program established is clearly necessary to avert a systemic failure within the Massachusetts dairy industry. Nearly half of the dairy farms in Massachusetts failed between 1980 and 1991. Likewise, New Jersey has suffered a substantial reduction in the number of its dairy farms. The record

clearly established that the average cost of production of Massachusetts dairy farmers substantially exceeded the amounts they received for their milk. (J.A. 27-28) In these circumstances, the Massachusetts Commissioner was entitled to provide a subsidy in order to "save an industry from collapse." (J.A. 128)

Petitioners' assertion that the true purpose of the Massachusetts Order is to isolate Massachusetts milk producers from competition, (See Pet. Br. 19-21 & n.20) is inaccurate. While it is true that the Order was designed to bolster Massachusetts dairy farmers and thereby make them better able to compete with other states, this was not done by projecting competitive restraints into other states. Instead, in the manner of all subsidies, Massachusetts improved the competitive posture of its own dairy farmers.

Petitioners' only argument about the purportedly anticompetitve effects of the Order can be made only by first drawing a faulty analogy between the Order and the actual setting of milk prices. Petitioners speculate about the action Massachusetts would have taken in response to competitive forces. If Massachusetts had assisted its farmers by setting Massachusetts milk prices, petitioners' aruge, it would then be forced to respond to lower prices in other States by imposing its own higher milk prices upon milk produced out-of-state, as was done in Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935). (See Pet. Br. at 23-25). But the premise for this line of argument is false; Massachusetts did not choose to set milk prices and was not, therefore, faced with the competitive dilemma described by petitioners. Massachusetts is merely engaged in utilizing its own funds to assist a flagging industry.[4]

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[4]Even if Massachusetts were shown to be motivated by a desire to achieve the same result as could be attained through such price fixing, this would not make its otherwise valid exercise of state authority improper. See Henneford, 300 U.S. at 586 (rejecting argument that motives, which "cause[d] [a use tax] to be stigmatized as equivalent to a protective tariff,"

2. The Massachusetts Order Furthers The Legitimate Purpose of Preserving Its Dairy Industry In A Manner Completely Consistent With the Commerce Clause.

Petitioners attempt to draw a negative inference from the fact that the Massachusetts Order was motivated by a desire to achieve the result of promoting the Massachusetts dairy industry. Petitioners attempt to equate the Massachusetts Order with the extraterritorial price-fixing scheme that was struck down in Baldwin simply because the measures share a common goal of fostering a State's dairy industry.

Yet, as the Court made clear in Bacchus, the goal of fostering local industry does not itself run afoul of the constitution, although the specific means chosen to attain that goal may do so:

> No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal. [Bacchus, 468 U.S. at 271 (emphasis added).]

Here the means chosen do not have the negative impact on interstate commerce that was presented with the price-setting scheme in Baldwin. The Massachusetts Order does

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could invalidated it, noting that "motives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful.").

not seek to "project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there," nor does it do the functional equivalent by placing barriers on the sale of milk that failed to sell for a minimum price. Instead, Massachusetts chose to use its own money, lawfully collected through a special fee program, to subsidize a valued industry.

While it is undoubtedly true that the Massachusetts Order, like "[e]very state police statute[,] necessarily will affect interstate commerce in some degree," it "does not run counter to the grant of Congressional power merely because it incidentally or indirectly burdens interstate commerce." Eisenberg, 306 U.S. at 351. Petitioner has produced no evidence to show that the Order imposes an undue burden on interstate commerce, apart from its conclusory assertion that the subsidy program will encourage more milk production by local farmers and thereby cause less out-of-state milk to be imported into Massachusetts. Contrary to this claim, the Commissioner specifically found that the Order (i) had no adverse effect on prices received by out-of-state producers, and (ii) was followed by a decrease in production by Massachusetts dairy farmers. (J.A. 88-89). Thus, there is no indication that the Order has imposed a significant adverse burden on interstate commerce.

Finally, the suggestion of petitioners that some alternative means less burdensome to interstate commerce should have been used by Massachusetts is without merit. Among their suggested alternatives is the use of a direct subsidy from general revenues to Massachusetts milk producers. But they do not explain how altering the source of the subsidy would remove any burden on interstate commerce. Although petitioners have repeatedly intimated that the dealer fees somehow draw money from out-of-state milk producers, they have never explained how this happens, nor have they rebutted the record findings to the contrary.

Petitioners have seized upon a fact having no real bearing on Commerce Clause analysis -- that some of the dealers who fund the subsidy in question are dealing in milk that originated in another state -- as a way of attacking completely legitimate subsidies to prevent the collapse of Massachusetts dairy farming. Since the Commerce Clause provides no reason for drawing a distinction between subsidies funded through general revenues and subsidies funded through special purpose fees and taxes, there is no constitutional basis for arbitrarily limiting the range of legislative choices available to States in carrying out their legitimate governmental functions. It may be that the voting public, upon whom the primary incidence of the fee falls, prefers such a special purpose fund on the grounds that it offers greater governmental accountability and provides them with a clearer picture of the purposes to which their increased milk prices are put.

Petitioners would deprive a State's voters of this option, forcing them to subsidize their dairy industry through general revenues or not at all. The Commerce Clause does not require such limits on a State's legislative options. See Hughes v.Alexandria Scrap Corp., 426 U.S. 794, 817 (1976)-(Stevens, J., concurring) (the Commerce Clause is "primarily intended . . . to inhibit the several States' power to create restrictions on the free flow of goods within the national market, rather than to provide the basis for questioning a State's right to experiment with different incentives to business").

II. Under Pike Balancing, the Legitimate Governmental Interests Advanced by the Massachusetts Order Outweigh the Incidental Effect Upon Interstate Commerce.

This Court has consistently held that the level of scrutiny that a court must give to a local law challenged under the Commerce Clause depends upon whether it patently discriminates against interstate commerce or is merely burdensome. See New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-274 (1988); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1988). When patent discrimination is involved, the regulation will be subjected to heightened scrutiny and a "virtually per se rule of invalidity" will be applied. Id. However, when a regulation serves a legitimate local governmental interest it will be invalidated only if its incidental burden upon interstate commerce is clearly excessive when weighed against the benefits it confers upon the state promulgating it. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

As previously stated, the courts have long recognized that the regulation of the milk industry is a legitimate exercise of a State's authority. See Nebbia v. New York, supra. In order to maintain an adequate supply of milk to consumers, the State must be concerned with the adequacy of milk supply. It is important to maintain a state's producers in times of oversupply of milk and resultant lower producer prices because of the heavy capital expenditure needed and the long time required to establish a new dairy herd. This is especially important in densely populated states like New Jersey where high land values increase the initial capital costs and thus the difficulty of getting into the dairy business.

Local dairy producers are essential to maintaining an adequate supply of milk for several reasons. First, a nearby supply of milk is necessary to meet emergency milk supply requirements. In addition, dealers must be able to monitor production quality standards by the dairy farmers. Moreover, the dealer's long term cost of securing local supplies (including transportation costs) are lower, thereby insuring reasonably priced milk to the state's consumers.

Furthermore, the volatility of the milk industry requires the maintenance of local dairy farmers in times of oversupply so they will maintain a presence during periods of shortage. A shortage of milk supply for fluid use occurred most recently in New Jersey and throughout the northeastern part of the United States during the period beginning in the fall of 1987 through the spring of 1990. During this period the presence of local farmers was essential to assuring an adequate supply of milk for consumers.

This legitimate state interest must be balanced against the incidental effect on interstate commerce. It is apparent from a fair reading of the record, that the assessment is applied evenhandedly to in-state and out-of-state dealers. All dealers may pass any increase on to Massachusetts' consumers. Any effect on interstate commerce would be slight while the state has a significant interest in assuring the maintenance of a fresh supply of milk to its citizens.

For these reasons, under Pike, the Massachusetts milk subsidy does not violate the Commerce Clause of the United States Constitution.

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted,

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